United Nations AT/DEC/1155

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1155

Case No. 1250: THIAM Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-President, presiding; Ms. Brigitte Stern; Ms. Jacqueline R. Scott;

Whereas, on 23 September 1993, Oumar Doudou Thiam, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application (1) requesting the Tribunal, inter alia to order, as compensation for loss of sight in the right eye, the retroactive application of the provisions of Appendix D to the Staff Rules relating to loss of function (in this case loss of sight in the right eye).

Whereas on, 28 July 1995, the Tribunal rendered Judgement No. 715, in which it considered that in declaring the claim time-barred, the Advisory Board on Compensation Claims (ABCC) acted in an arbitrary manner and that this aspect of the case should be considered on its merits; found that the ABCC did not set forth its observations, conclusions and the reasons for its recommendations sufficiently clearly; remanded the case to the ABCC so that a proper report could be prepared; and, determined that if the results were not satisfactory to the Applicant, he could invoke the provisions of Appendix D, article 17, to request the convening of a medical board.

Whereas, on 1 March 2001, the Applicant again filed an Application (2) requesting the Tribunal to order immediate payment of Applicant's disability benefits

as estimated by the secretariat of the United Nations Joint Staff Pension Fund (UNJSPF) on 8 August 1984.

Whereas on 26 July 2002, the Tribunal rendered Judgement No. 1068, rejecting the Application in its entirety. The Tribunal held that

> "It is evident that this result is different from that in Judgement No. 715, where the Tribunal decided on humanitarian grounds to receive the Application. First, the Applicant could have raised these issues in the Application that led to Judgement No. 715. Also, while the basic facts are alike in the two cases, the relative importance of certain events is not the same in the two Applications, because different claims are made."

Whereas, on 18 May and again on 12 October 2000, the Applicant filed further applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 February 2002, the Applicant, after making the necessary corrections, again filed an Application (3), requesting the Tribunal to:

> "Order full application of article 11-1(b) of Appendix D to the Staff Rules taking into account the health condition of the Applicant and the importance of his disability as certified by all the ophthalmologist doctors consulted, including the eye expert doctor recommended and designated by the Director of the United Nations Medical Service.
>
> ... [O]rder payment of all medical, hospital and directly related costs of [the] Applicant's illness after his separation from the Organization as authorized by recommendations of the []. The Applicant is claiming compensations to be paid as authorized by the relevant recommendation of the [ABCC] and not mere reimbursement of medical invoices. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 August 2002 and once thereafter until 30 November 2002;

Whereas the Respondent filed his Answer on 12 September 2002;

Whereas the Applicant submitted an additional communication on 10 October 2003;

Whereas the facts additional to the facts set forth in Judgements No.714 and No. 1068 are as follows:

On 8 July 1991, the Applicant wrote to the Secretary of the ABCC, requesting that his case be reopened and that he be provided with compensation under article 9 of Appendix D to the Staff Rules, for "loss of vision [in] right eye".

Following submission of further evidence, the ABCC reconsidered the case at its 347th meeting on 8 October 1992. Having found there was no indication that there was a service-incurred injury at the time indicated, or other circumstances warranting the waiver of the time-limit, the Board recommended to the Secretary-General, that the claim for compensation under Appendix D not be accepted. The Secretary-General approved the ABCC recommendations on 2 November 1992.

On 7 April 1993, the Applicant requested the Secretary-General to reconsider his determination that the Applicant's injury to his right eye was not attributable to the performance of official duties, and on 3 May 1993 this request was forwarded to the ABCC. On 24 June 1993, the Applicant was informed that his claim had been denied.

On 23 September 1993, the Applicant filed an application with the Tribunal. In its Judgement No. 715, the Tribunal remanded the case to the ABCC so that a proper report could be prepared. On 15 March 1996, the ABCC reconsidered the case at its 372nd meeting, deciding that it required additional medical information and it requested the Secretary to obtain the following: (a) the report of the physician who first saw the claimant after the alleged incident and who referred him to an ophthalmologist; (b) the report of the ophthalmologist; and (c) to inquire whether a medical exit exam was performed when the claimant separated from UNHCR and, if so, to obtain a copy.

On 23 April 1996, the Applicant submitted a more comprehensive and chronological summary of the events and circumstances regarding his claim to the Secretary, ABCC. In his submission, he stated that "my left eye which was not been injured during this mission is in excellent shape".

At its 373rd meeting of 30 April 1996, the ABCC reviewed the case again and recommended that the Applicant's loss of vision in right eye be recognized as attributable to the performance of official duties and that he be awarded compensation in the amount of $24,383.52, equivalent to a twenty-four (24) per cent loss of function of the whole person, as provided under Article 11.3 of Appendix D to the Staff Rules. On 13 May 1996, the Secretary-General adopted the recommendations of the ABCC.

On 7 August 1996, the Applicant addressed a letter to the ABCC, objecting to the determination of loss of function of 13 May 1996. He transmitted an ophthalmological report dated 31 July 1996, prepared by an independent

ophthalmologist in Vienna. This report referred to the Applicant's loss of sight in his right eye, and mentioned that his left eye had now developed a cataract, rendering him "unable to fulfil his professional duties". The ophthalmologist in question stated that the Applicant's professional disability at that time amounted to "at least 80%".

On 13 September 1996, the Director, Medical Services Division, (the Medical Director) informed the ABCC that it appeared that the Applicant's left eye condition could be considerably improved with proper treatment. Therefore, before making a recommendation on whether the percentage of permanent loss of function should or not be modified, the Applicant would have to "undergo all necessary treatment(s) that are indicated for his left eye condition". On 24 September 1996, the ABCC informed the Medical Director that the Applicant had submitted another medical report dated 19 September 1996 from the ophthalmologist in Vienna. According to the report, the only appropriate treatment would be a successful cataract operation with lens implantation, which the Applicant was not willing and could not be obliged to undergo. The ABCC asked the Medical Director for advice.

On 10 October 1996, the Medical Director, informed the ABCC that in her medical opinion, "the impairment of vision caused by cataract formation in his left eye now suffered by [the Applicant] is not and cannot be the result of the blunt injury which he previously suffered in his right eye". The Medical Director concluded that "there is [sic] no medical grounds to conclude that the determination originally made by the ABCC that [the Applicant] suffered 24% impairment of the whole person should be disturbed, altered or amended in any way because of the non-service-incurred impairment of the vision in [the Applicant's] left eye". The Applicant was so informed on 30 October 1996.

Following a further request for advice dated 21 January 1997, the Medical Director informed the Secretary, ABCC, that her earlier decision of 10 October 1996 stood.

On 11 July 1997, the Medical Director was asked to determine whether a number of medical expenses submitted by the Applicant could be considered as directly related to the service-incurred injury to his right eye and reasonable for the treatments/services provided. In her reply of 29 July 1997, the Medical Director informed the ABCC that with respect to bills related to the treatment of the left eye, "[W]e would like the Board to decide whether to approve this bill or not. The illness

of the left eye is not related to [the Applicant's] performance of duties on behalf of the Organization. However, since [the Applicant] has lost his vision from the right eye, the Board might consider that optimising the left eye vision could be considered as acceptable medical expense."

Following a recommendation of the ABCC, on 22 August 1997, at its 381st meeting, the Secretary-General decided, 8 September 1997, "[t]hat all medical expenses certified by the Medical Director as reasonable and directly related to the claimant's illness (loss of vision in right eye) be reimbursed". The Applicant was so informed on 6 October 1997.

The ABCC reconsidered the case again at its resumed 381st meeting on 10 October 1997. On 6 November 1997, the Secretary-General adopted the following recommendation of the ABCC, namely to uphold the determination of the Medical Director, as contained in her memoranda of 10 October 1996 and 7 March 1997, and to reimburse the Applicant for air tickets and hotel accommodations only upon confirmation from the Joint Medical Service, United Nations Office at Geneva (UNOG), (JMS) that it had recommended that the Applicant obtain medical treatment in London. On 17 November 1997, the Secretary, ABCC, informed the Applicant of the decision of the Secretary-General and also that the JMS had advised that it had not recommended a medical evacuation to London. In light of this information, no reimbursement could be made for the air tickets Geneva-London-Geneva or for hotel accommodations.

On 18 March 1998, the Secretary, ABCC, asked the Medical Director to review additional documentation provided by the Applicant, who maintained that "his travel and stay for treatment in Cambridge were "recommended in full agreement with the Director of the JMS" and to determine whether any of those medical expenses could be reimbursed and whether her previous determination on this matter remained unchanged. In her reply of 28 April 1998, the Medical Director informed the ABCC that the Applicant had not proven that his treatment in the United Kingdom and France had been recommended by the JMS, and that her earlier decisions stood. The Applicant was so advised on 21 May 1998.

On 15 December 1998, at its 388th meeting, the ABCC recommended to the Secretary-General, and; on 17 December 1998, the Secretary-General adopted the recommendation of the ABCC, as follows:

> "... (b) as regards the right eye, that the compensation equivalent to a twenty-four (24) per cent permanent loss of function of the whole person remains unchanged;
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> ...
>
> (ii) that the claimant be reimbursed for those medical and related expenses which have been certified by the Medical Director as reasonable and directly related to the service-incurred injury, and for which the required supporting documentation has been provided, in the currency and amount in which the expense was incurred, but that no interest shall be paid on any such amounts; ..."

On 18 February 1999, at its 389th meeting, the ABCC recommended to the Secretary-General, and the Secretary-General decided, on 21 February 1999, as follows:

> "(i) in regard to the reimbursement of medical expenses for which no supporting documentation has been provided, those expenses which have been certified by the Medical Director as directly related to the loss of vision of the right eye and as reasonable for the treatments/services provided, may be reimbursed, on an exceptional basis, subject to confirmation of the following: (a) that the surgeries where performed as stated by the claimant; and (b) that the claimant was hospitalised at the Clinique Générale de Genève and that the amount of CHF 9,000 is reasonable for the length of the hospitalisation and for the treatments received; and that payment may be effected only upon approval by the Controller;
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> (ii) [the ABCC's] previous recommendations that only those medical and related expenses which have been certified by the Medical Director as being directly related to the service-incurred injury to the right eye and reasonable for the treatments/services provided may be reimbursed, be upheld; and
>
> (iii) based on the documentation provided by the claimant and on the report of the Medical Director, those expenses related to travel, hotel and living costs incurred as a result of treatment in the United Kingdom may not be reimbursed, as the [JMS] had not expressly recommended that the claimant obtain medical treatment in London."

On 28 May 1999, and in connection with the Secretary-General's decision of 21 February 1999, the Secretary, ABCC, wrote to the Officer-in-Charge (OiC) of Compensation Claims, UNOG, with a copy to the Applicant, informing him of the decision of the Secretary-General, and asking him to seek additional information in connection with the Applicant's undocumented medical claims, with a view to implementing such decision. On 11 June 1999, the Applicant sent additional information.

In his reply of 5 July 1999, the Officer-in-Charge of Compensation Claims provided all additional information that he was able to obtain in connection with the undocumented claims presented by the Applicant, including information that a bill from one of the doctors had never been paid by the Applicant. On 30 July 1999, the Applicant objected to the "enquiry" by the Officer-in-Charge.

On 26 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. When the service incurred injury to the Applicant's right eye was at long last recognized as attributable to the performance of official duties, the left eye, which was affected as early as March 1983 became completely ill and impairment was 80%. The decision to maintain the impairment of the whole person to be 24% is most inappropriate and violates his rights.

2. The non-payment of all outstanding medical bills as recommended by the ABCC violates the Applicant's rights.

Whereas the Respondent's principal contentions are:

1. The Applicant's request for greater compensation under Article 11 of Appendix D should be denied: proper procedures were followed in determining the percentage of loss of function; the Applicant is estopped from asserting that his other eye was affected; illnesses arising subsequent to the service-incurred injury should not figure in the percentage of loss of function equation.

2. The Secretary-General's decision in this case was properly made and his acceptance of the ABCC recommendations was a reasonable exercise of his discretion. A challenge to the award of compensation based upon a medical determination of a 24 per cent loss of function of the whole person should have been submitted by the Applicant to a medical board pursuant to Article 17 of Appendix D, in the absence of which it is not receivable. If receivable, the matter would be time-barred.

3. There is no basis on which to award the requested payment of undocumented medical and related bills, including the cost of travel to London, England.

4. The Secretary-General's decision in this case was not tainted by improper motive, abuse of discretion or other extraneous factors.

The Tribunal, having deliberated from 28 October to 18 November 2003, now pronounces the following Judgement:

I. This Application arises out of a decision by the ABCC to award the Applicant compensation for an alleged service incurred injury to his right eye. The Application contains two separate pleas. The first contests the decision of the Secretary-General, adopting the recommendation of the ABCC, that the Applicant be awarded compensation based upon a determination of a twenty four percent (24%) loss of function of the whole person, pursuant to Appendix D to the Staff Rules. The second challenges the Secretary-General's decision, again adopting the ABCC's recommendation, to reimburse the Applicant only for those medical expenses and costs that were certified by the Medical Director as being documented and directly related to his injury.

II. The Respondent alleges, inter alia, that the Application is time-barred and not receivable.

III. The Tribunal, before it may address the merits of the Applicant's claims, must first determine whether his claims are time-barred or not receivable. In relevant part, article 7(4) of the Statute of the Administrative Tribunal provides that:

> "An application shall not be receivable unless it is filed within ninety days ... reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the Applicant."

Article 7(5) further provides that:

> "In any particular case, the Tribunal may decide to suspend the provisions regarding time limits."

The Secretary-General's initial decision on the Applicant's loss of function, following a remand of the issue from the Tribunal to the ABCC, was issued on 13 May 1996. After numerous reconsiderations by the ABCC regarding the degree of the Applicant's loss of function and regarding the Applicant's claims for medical expenses allegedly attributable to his service-incurred injury, the Secretary-General's ultimate decision regarding the Applicant's claim for loss of function was issued on 17

December 1998 and for reimbursement of medical expenses on 21 February 1999. Subsequently, the Applicant and the OiC of Compensation Claims, UNOG, engaged in correspondence and an exchange of documents and information, all relating to the Applicant's claim for reimbursement of medical expenses for which reimbursement had been denied by the Secretary-General's decision on 21 February 1999. The last communication in the record from either the Respondent or the Applicant, relating to the Applicant's claims for reimbursement was on 30 July 1999 when the Applicant objected to the enquiry by the OiC.

IV. Applying the most favorable reading to the Applicant's facts, the Tribunal finds that the Applicant first submitted his Application on 18 May 2000, some fifteen months after the Secretary-General's final decision regarding his claims, over eight months from the last communication with the Respondent regarding his claims for medical expense reimbursement and well beyond the required filing time limits of ninety days set forth in Article 7(4) of the Tribunal Statute. Although the Tribunal has authority to extend its time limits in exceptional circumstances (see Judgement No. 715, *Thiam*, (1995)), the Tribunal has previously recognized the importance of adhering to time limits. (See Judgements No. 359, *Gbikpi* (1985); No. 1094, *Al-Hafiz* (2003).) The Applicant has failed to demonstrate any exceptional circumstances that might form the basis for extension in this case. The Applicant is well aware of the time limits for filing, because that issue was raised and addressed by the Tribunal in Judgment No. 715. In that decision, the Tribunal granted a waiver of the time limits to the Applicant for humanitarian reasons, "in view of the progression of the disease from which he suffered". At the time, the Applicant had alleged that he was unable to prepare and submit his case, because of his eye disease. Although the Tribunal recognizes that the Applicant continues to suffer from a loss of vision, it is not convinced that his condition is so immediately precarious or acute that he was unable to file his Application in a timely fashion. The Tribunal notes that even after the Secretary-General's last decision, the Applicant was engaged in extensive communication with the ABCC and the OiC of Compensation Claims, UNOG, including writing letters, submitting expenses and relevant documentation relating to expenses, and making arguments in support of his claims. The Tribunal finds no evidence that the Applicant was precluded by his condition from filing his Application in a timely fashion, and absolutely no evidence explaining or justifying a delay of more than one year in submitting his claims to the Tribunal.

V. The Tribunal notes that the Applicant's case is a perfect example of why time limits exist, and why, barring exceptional circumstances, they are not to be extended. With respect to the Applicant's claims for reimbursement of medical expenses, the Applicant makes claims for expenses that are, in some cases, more than ten years old. With respect to some of those expenses, the Applicant is unable to provide evidence of having incurred them, because too much time has elapsed. In at least two instances where the Applicant sought to obtain duplicate records to demonstrate those expenses, the record holders explained that they were unable to provide such duplicates, having previously destroyed their records, due to the great length of time that had elapsed since service was provided to the Applicant. In one case, the record holder was only required to maintain its records for ten years. Without addressing the substance of the Applicant's allegations, the Tribunal is satisfied that the Applicant himself sees first-hand the importance of meeting time limits. The Tribunal finds that the Applicant's claims are time-barred.

VI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(*Signatures*)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary